Supreme Court, U.S.
FILED
SEP 24 1998
OFFICE OF THE CLERK

(3)

No. 97-1930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE CESSNA AIRCRAFT COMPANY,

Petitioner,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

HERBERT L. FENSTER*
JEREMY M. GRIFFIN
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
Counsel for Petitioner
**Counsel of Record*

15 pp

QUESTIONS PRESENTED

Whether an Executive Branch agent can obligate and spend newly appropriated funds before the President has apportioned those moneys as required by statutes intended to effect Congress' plenary authority under Article I, Section 9, Clause 7 of the Constitution?

Whether a valid contract can exist notwithstanding the fact that it is based on violations of statutes and regulations governing the obligation of funds from the Treasury?

Whether a contractor has standing to challenge the validity of a contract that was based on a violation of statutes and regulations and that caused financial harm to that contractor?

RULE 29.6 STATEMENT

Petitioner The Cessna Aircraft Company is a wholly-owned subsidiary of Textron Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Appeal of The Boeing Co., ASBCA No. 37579, 90-3 B.C.A. ¶ 23 9

Arkansas v. Farm Credit Serv. of Cent. Ark., 117 S. Ct. 1776 (1997) 7

Clinton v. City of New York, 118 S. Ct. 2091 (1998) 2, 8

Estate of Cowart v. Nichols Drilling Co., 505 U.S. 469 (1992) 4

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 4

Hercules Inc. v. United States, 116 S. Ct. 981 (1996) 2, 4, 7

Russello v. United States, 464 U.S. 16 (1983) 6

STATUTES

31 U.S.C. § 1341 ..... 4, 6

31 U.S.C. § 1512(a) (1994) 2, 3

31 U.S.C. § 1517(a) 3

31 U.S.C. § 1571(a) 6

Ch. 251, § 7, 16 Stat. 251 (1870) 5

Ch. 52, 3 Stat. 567 (1820) 4

No. 97-1930

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

THE CESSNA AIRCRAFT COMPANY,
Petitioner,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

Petitioner, The Cessna Aircraft Company ("Cessna"), hereby replies to the Brief for the Respondent in Opposition.

The issue in this case is whether statutes enacted to protect the Constitutionally grounded power of the purse are subordinate to a low-level bureaucrat's immediate, parochial interests in exercising a contract option. Respondent's success in convincing lower tribunals that administrative expediency and convenience are paramount arises because this Court has never spoken definitively on the separation of powers issue presented here.

Previously, this Court has ruled that Congress cannot, even for sound policy reasons, arrogate to the Executive the option of dispensing with Constitutionally mandated procedures governing the appropriation of money. *See Clinton v. City of New York*, 118 S. Ct. 2091, 2107-08 (1998). This Court has also held that laws governing the Executive's authority to obligate appropriated money must be strictly construed. *See Hercules Inc. v. United States*, 116 S. Ct. 981 (1996). Consistent with those holdings, the Court should strictly construe the apportionment statues at issue in order to compel the Executive to place compliance with those mandated procedures ahead of expediency.

ARGUMENT

Respondent's position depends entirely on two premises: that the apportionment statute is ambiguous (and inconsequential); and that Congress intended for Executive officials to circumvent the apportionment process when exigent circumstances make doing so expedient. Both premises are flawed. First, the statute is not ambiguous, and the rule of statutory construction advocated by Respondent is inapposite. Second, the interpretation that Respondent urges would render illusory Congress' mandate prohibiting the Executive from obligating and expending funds in excess of an apportionment.

Respondent agrees that 31 U.S.C. § 1512(a) (1994) requires the President to apportion appropriations to prevent federal agencies, such as the Navy, from spending appropriated funds too rapidly. (Brief for the Respondent in Opposition ("Opp.") at 7.) In fact, the President's lawful authority to allocate and impound appropriated funds under the statutes discussed in *Clinton v. City of New York*, 118 S. Ct. 2091, 2107 (1998), depends entirely on the Executive's compliance with the

statutorily mandated apportionment process. As Respondent correctly notes, that apportionment process "is a central aspect of the laws governing expenditures by federal agencies." (Opp. at 7-8.) Respondent also agrees that federal law prohibits the obligation and expenditure of funds in excess of any apportioned amount. (*Id.*) Respondent then admits that the Navy's contracting officer obligated all of the appropriated money at issue *before* the President apportioned any of it. (Opp. at 7.) This was entirely legal, according to Respondent, solely because the word "before" does not appear in the text of 31 U.S.C. § 1512(a), meaning that an Executive official can obligate and expend all appropriated money so long as the President has not *yet* apportioned *any*. (Opp. at 8.)

Section 1517(a) provides that officers and employees of the Government "may not make or authorize an expenditure or obligation exceeding – (1) an apportionment." 31 U.S.C. § 1517(a). Respondent agrees that this provision renders unlawful obligating or expending money exceeding an apportionment. Logic and reason dictate that where no funds have been apportioned, any amount obligated or expended exceeds the amount apportioned - none.

Casting logic and reason aside, Respondent advances a cynical alternative that would render illusory a set of laws that are the cornerstone to protecting the power of the purse. By spending an entire appropriation *before* receiving authority to spend a restricted amount, a bureaucrat avoids spending more than the restricted amount. In other words, the law is not violated; it is evaded. A low-level bureaucrat does not usurp Presidential authority; the bureaucrat just exercises it (thereby precluding the Executive from any decision).

Avoiding the illogic created by its cavalier application of the apportionment statutes, Respondent conjures a

nonexistent ambiguity. Respondent cites language from the Anti-Deficiency Act (31 U.S.C. § 1341) for guidance in interpreting § 1517. Doing so violates the most basic rule of statutory construction, one that is essential to keep courts from legislating a result favored by a party over that which is dictated by plain language. *See, e.g., Estate of Cowart v. Nichols Drilling Co.*, 505 U.S. 469, 475 (1992) (when statute's language is clear, court does not look for another meaning); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

Even if the language of the apportionment statute were not clear enough, the provisions of the Anti-Deficiency Act do not support Respondent's interpretation of § 1517(a). In language virtually identical to that appearing in the apportionment statute, the Anti-Deficiency Act prohibits expenditures and obligations "exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A). A second provision also prohibits officials from involving the government "in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). This prohibition has historically meant that officials could not obligate money on a contract *in excess* of an appropriation for that contract, and the Supreme Court recently affirmed that interpretation. *Hercules Inc. v. United States*, 116 S. Ct. 981, 986 (1996) (The Anti-Deficiency Act "bars a federal agency employee or agency from entering into a contract for future payment of money in advance of, or in excess of, and existing appropriation.")

No legislative history nor applicable rule of statutory construction dictates a different interpretation of that Act today. In citing the current codification of the Anti-Deficiency Act, Respondent ignores the Act's history. In 1820, Congress prohibited the Executive from entering into contracts except "under a law authorizing the same,"

(*i.e.*, where no money was available for that purpose. Ch. 52, 3 Stat. 567 (1820). (Pet. App. 1e.)[1] In 1870, Congress recodified that same prohibition by stating that "it shall not be lawful for any department . . . to involve the government in any contract for the future payment of money in excess of [an appropriation.]" Ch. 251, § 7, 16 Stat. 251 (1870) (Pet. App. 1e.) Though Congress used the phrase "in excess of," there is nothing to suggest that it was now permissible to enter into contracts in advance of appropriations. Respondent's serendipitous semantic discovery is no basis for altering a well-established statutory interpretation of laws designed to protect separation of powers principles.

The 1870 act was recodified yet again in 1905 to prohibit the involvement of the Government "in any contract or obligation for the future payment of money "in excess of such appropriation." Ch. 1484, § 4, 33 Stat. 1257 (1905). (Pet. App. 2e-3e.) In 1950, Congress again recodified the Anti-Deficiency Act to prohibit involving the government "in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose." Ch. 896, § 1211, 64 Stat. 763, 765-68 (1950) (Pet. App. 3e-9e.) The most recent codification of that prohibition occurred when the Anti-Deficiency Act was recodified as 31 U.S.C. § 1341(a)(1) to prohibit the Executive from entering contracts "before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B) (Pet. App. 10e.) Thus, since 1820 the Executive can only sign contracts for which is already has enough money to cover the obligation to pay.

---

[1] "Pet. App." refers to the Appendix in the Petition.

Though the exact words used in the 1820 act and the ensuing recodifications have changed with time, no legislative history or other authority supports the proposition that Congress intended to change in any respect the prohibition contained in the Anti-Deficiency Act: obligating the government to pay any amount greater than that expressly made available for a given purpose. This immaterial change in the language of the Anti-Deficiency Act, however, is the basis for Respondent's current interpretation of the apportionment statute. What Respondent urges this Court to presume, therefore, is that when Congress recodified the Anti-Deficiency Act, 31 U.S.C. § 1341, using the word "before" in lieu of the phrase "in advance of" or "in excess of," Congress intended to give low-level bureaucrats discretionary authority to circumvent the apportionment statute, 31 U.S.C § 1571(a).

Respondent cites only one case to support its remarkable assumption that Congress implicitly intended for low-level bureaucrats to obligate for a parochial purpose money that the President has not made available for any purpose: *Russello v. United States*, 464 U.S. 16 (1983). *Russello* does not address the Constitutional principles at issue here.

Russello was convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Court had to decide whether insurance proceeds obtained by Russello as a result of his arson activities should be forfeited as an "interest . . . acquired . . . in violation of [RICO]." *Id.* at 17. In rejecting Russello's narrow interpretation of "interest," the Court noted that the applicable forfeiture provision, § 1963(a)(1) "speaks broadly of 'any interest' . . . acquired" while the immediately preceding subsection, § 1963(a)(2) expressly limits the meaning of the word. *Id.* at 23. Had Congress

intended similarly to limit the meaning of "interest" for purposes of § 1963(a)(1), it could have done so.

Even if there were a need to resort to rules of statutory construction, nothing in *Russello* supports Respondent's argument. Petitioner agrees that when Congress intends to use the same word differently within a statute, courts must construe each provision as Congress intended. That, however, is not what Respondent is advocating. Respondent advocates a new rule whereby the Legislature can convey intent only through a designated word or phrase. Once that intention is understood, only that word or phrase can express the same purpose in another provision – regardless of what effect interpreting its omission from the other provision would have on enforcing that provision's purpose. *Contra Arkansas v. Farm Credit Serv. of Cent. Ark.*, 117 S. Ct. 1776, 1780 (1997) (statute must be enforced according to its terms, and court must guard against statutory interpretation that might defeat Congressional purpose).

Using Respondent's rule of interpretation, Respondent would have this Court presume that Congress intended to open a loophole in the *apportionment statute* when it recodified the *Anti-Deficiency Act* using the term "before" without incorporating that same term simultaneously in the apportionment statutes.[2] Through this loophole conjured by Respondent, a low-level bureaucrat could obligate an entire appropriation without regard to the President's statutorily mandated obligation to prevent the bureaucrat from doing precisely that. Such a

---

[2] This Court did not attach significance to the language change upon which Respondent's theory depends. *See Hercules*, 116 S. Ct. at 987.

delegation of authority over funds appropriated by the Congress pursuant to its power of the purse ought not to be inferred for expediency sake, especially where the plain reading of the statute dictates the opposite result. *See Clinton*, 118 S. Ct. at 2108. ("The Constitution's structure requires a stability which transcends the convenience of the moment.") (Kennedy, J., concurring).

Respondent's current interpretation serves only that which it views as expedient under the exigent circumstances created by it in this case. Without citing any support or providing any rationale, Respondent states that it would be "sensible to conclude that Congress would have wanted to permit expenditure or obligation of appropriated funds in certain circumstances even before they are apportioned by OMB pursuant to the statutory procedure, including the timetables set forth in 31 U.S.C § 1513(b)(2)." (Opp. at 8-9.) Had Congress deemed it "sensible" to do so, it could have done as Respondent suggests.[3] That Congress chose not do so for circumstances that Respondent deems "sensible" does not confer on a court the Legislature's prerogative to create a statutory exemption.[4]

The last time Respondent urged an interpretation of this statute to serve immediate needs, it adopted

---

[3] In fact, § 1516 sets forth explicitly the exemptions that Congress deemed appropriate, and does not include "a situation like the one in this case" described by Respondent. (Pet. App. 18e.)

[4] At the root of this case is Congress' continuing inability to complete the appropriations process by the beginning of each fiscal year. Respondent's position, in essence, seeks to involve the Court in pandering to this continuing lack of discipline by a coordinate branch.

Petitioner's argument. NAVAIR, the same procuring activity appearing here as the Respondent, argued that funds were not available to a contracting officer because the President had not apportioned them. Much like in the underlying facts of this case, the *Appeal of The Boeing Co.*, ASBCA No. 37579, 90-3 BCA ¶ 23,202, involved NAVAIR's attempt to exercise a contract option when the availability of funds was in question. NAVAIR inserted into its contract with Boeing an option extension provision preserving NAVAIR's ability "to keep open the Government's right to exercise its fiscal year production options if funds were not appropriated before the beginning of the applicable fiscal year." *Id* at 116,435[5]

The provision gave NAVAIR the right to exercise its option within sixty days "'after funds are made available from the Congress/President.'" *Id.* Boeing and NAVAIR disputed whether the option was exercised timely. In support of NAVAIR's case,

> the government [urged] "that the only reasonable construction of the language . . . would be *that funds are not made available by the President until all the statutory and regulatory requirements have been satisfied which must occur prior to the obligation of funds by the contracting officer*[.]" (Gov't br. at 9).

---

[5] The provision was deemed necessary in the event that funds were not available on the first day of the fiscal year. *Id.* In other words, NAVAIR provided *by contract* for the "situation like the one in this case, where the Appropriation Act was signed by the President on the first day of the fiscal year." (Opp. at 9.) Thus, the proper solution for a situation like this would have been to provide for it in the contract, not to redraft the apportionment statute as Respondent suggests.

Id. at 116,439 (emphasis added). In other words, according to Respondent, a NAVAIR contracting officer, like the one in this case, cannot expend or obligate funds unless and until they are made available through the apportionment process. Petitioner agrees, and has set forth that position before this Court.

Respondent, apparently, has changed its preferred interpretation. The proper interpretation of laws central to governing expenditures depends not on plain language, rules of construction, or even what "it is . . . sensible to conclude." Rather, the interpretation Respondent would advocate depends entirely on which of its parochial interests will be advanced in a given case. Petitioner urges the Court to give the issue the proper consideration that it is due, and to give the statute the meaning that was intended by the Congress.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

HERBERT L. FENSTER*
JEREMY M. GRIFFIN
MCKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
Counsel for Petitioner
**Counsel of Record*

September 1998